

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KENNETH GIBBS,
Plaintiff,
v.
T. WOOD, et. al.,
Defendants.

Case No. [15-cv-4115-TEH](#)
ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS; ORDER OF
SERVICE

Docket No. 23

Plaintiff Kenneth Gibbs, a state prisoner, filed this pro se action under 42 U.S.C. § 1983. The case proceeds against Defendants Wood, Milton, Royal and Evans.¹ Plaintiff alleges that Wood transferred Plaintiff to a different Administrative Segregation ("Ad. Seg.") unit in retaliation for filing a grievance; Wood, Milton and Royal placed Plaintiff on C-status in retaliation for filing a grievance; and Evans used excessive force against Plaintiff in retaliation for calling another officer a racist. Defendants have filed a motion to dismiss on the grounds that the claim against Wood for transferring Plaintiff and the claim against Evans are barred by the statute of limitations. Plaintiff has opposed the motion, and Defendants have filed a reply. For the reasons that follow, Defendants' motion is GRANTED.

¹ Defendant Milton has not been served.

I

A

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the legal sufficiency of the claims alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003). All allegations of material fact are taken as true. Erickson v. Pardus, 551 U.S. 89, 94 (2007). However, legally conclusory statements, not supported by actual factual allegations, need not be accepted. See Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (courts are not bound to accept as true "a legal conclusion couched as a factual allegation"). "A plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (alteration in original) (internal quotation marks omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id.

B

Section 1983 does not contain its own limitations period. The appropriate period is that of the forum state's statute of limitations for personal injury torts. See Wilson v. Garcia, 471 U.S. 261, 276 (1985); TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999); Elliott v. City of Union City, 25 F.3d 800, 802 (9th Cir. 1994). In California, the general residual statute of limitations for personal injury actions is the two-year period set forth at California Civil Procedure Code section 335.1 and is

1 the applicable statute in § 1983 actions. See Maldonado v.
2 Harris, 370 F.3d 945, 954 (9th Cir. 2004); see also Silva v.
3 Crain, 169 F.3d 608, 610 (9th Cir. 1999) (limitations period for
4 filing § 1983 action in California governed by residual
5 limitations period for personal injury actions in California,
6 which was then one year and was codified in Cal. Civ. Proc. Code
7 § 340(3)); Cal. Civ. Proc. Code § 335.1 (current codification of
8 residual limitations period, which is now two years; enacted in
9 2002).²

10 It is federal law, however, that determines when a cause of
11 action accrues and the statute of limitations begins to run in a
12 § 1983 action. Wallace v. Kato, 549 U.S. 384, 388 (2007);
13 Elliott, 25 F.3d at 801-02. Under federal law, a claim generally
14 accrues when the plaintiff knows or has reason to know of the
15 injury that is the basis of the action. See TwoRivers, 174 F.3d
16 at 991-92; Elliott, 25 F.3d at 802.

21 ² California Civil Procedure Code section 352.1 recognizes
22 imprisonment as a disability that tolls the statute of
23 limitations when a person is "imprisoned on a criminal charge, or
in execution under the sentence of a criminal court for a term
less than for life." See Cal. Civ. Proc. Code § 352.1(a).

24 A district court "may take notice of proceedings in other
25 courts, both within and without the federal judicial system, if
26 those proceedings have a direct relation to matters at issue."
27 Bias v. Moynihan, 508 F.3d 1212, 1225 (9th Cir. 2007). The Court
28 takes judicial notice that Plaintiff is sentenced to life without
the possibility of parole. Request for Judicial Notice ("RJN"),
Docket No. 24, Ex. C; See also Gibbs v. Ayers, Case No. CV 00-
6349, Docket No. 46 at 2 (C.D. Cal. May 17, 2001). Plaintiff is
not entitled to this tolling, nor does he argue for this
additional tolling.

C

Plaintiff previously proceeded with a case in this Court with several claims including the same allegations against these Defendants. See Gibbs v. Farley ("Gibbs 1"), Case No. 13-cv-0860-TEH (N.D. Cal. Feb. 18, 2016). On July 21, 2015, the Court granted in part Defendants' motion for summary judgment in Gibbs 1 and dismissed claims against these Defendants without prejudice for failure to exhaust. Gibbs 1, Docket No. 167. Plaintiff did not exhaust administrative remedies until several months after commencing the action. A prisoner must exhaust his administrative remedies for constitutional claims prior to asserting them in a federal civil rights complaint. 42 U.S.C. § 1997e(a); McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002).

The instant action contains the same allegations against the same Defendants. However, Plaintiff was able to proceed with this action because the claims were exhausted prior to its filing. Defendants argue that two of the claims are untimely.

The cause of action against Defendant Wood accrued on January 3, 2013, the date Wood allegedly transferred Plaintiff to a different Ad. Seg. unit. The statute of limitations expired two years later on January 3, 2015. The complaint was filed on August 12, 2015, and thus is untimely unless Plaintiff is entitled to tolling.³ A federal court must give effect to a state's tolling provisions. See Hardin v. Straub, 490 U.S. 536, 543-44 (1989); Marks v. Parra, 785 F.2d 1419, 1419-20 (9th Cir.

³ The Court affords Plaintiff application of the mailbox rule as to all his relevant filings. Houston v. Lack, 487 U.S. 266, 275-76 (1988) (pro se prisoner filing is dated from the date prisoner delivers it to prison authorities).

1 1986).

2 Plaintiff is entitled to tolling for the time he was
3 administratively exhausting his claims. See Brown v. Valoff, 422
4 F.3d 926, 942-43 (9th Cir. 2005). The administrative appeal was
5 submitted on January 23, 2013 and denied at the final level on
6 June 13, 2013. Opposition at 20; Docket No. 1-1 at 42-44.
7 Plaintiff is entitled to 142 days of tolling, which extends the
8 statute of limitations to May 25, 2015. This action was not
9 filed until August 12, 2015; therefore, the claim is untimely.

10 The cause of action against Defendant Evans accrued on March
11 15, 2013, the date Evans allegedly assaulted Plaintiff. The
12 statute of limitations expired two years later on March 15, 2015;
13 thus, this action which was not filed until August 12, 2015, is
14 untimely absent tolling. Plaintiff is entitled to tolling while
15 he was exhausting administrative remedies. He filed an
16 administrative appeal on March 17, 2013, that was denied on July
17 19, 2013, giving Plaintiff 124 days of tolling. Opposition at
18 31; Docket No. 1-1 at 19-24. With these 124 days of tolling,
19 Plaintiff needed to have filed his action by July 17, 2015. The
20 action, filed on August 12, 2015, was nearly a month late.

21 Plaintiff is not entitled to tolling while the previous
22 federal action was pending. "[A] suit dismissed without
23 prejudice is treated for statute of limitations purposes as if it
24 had never been filed." Elmore v. Henderson, 227 F.3d 1009, 1011
25 (7th Cir. 2000). Conversely, "a prescriptive period is not
26 tolled by filing a complaint that is subsequently dismissed
27 without prejudice." Chico-Velez v. Roche Products, Inc., 139
28 F.3d 56, 59 (1st Cir. 1998). Thus, "[i]n instances where a

1 complaint is timely filed and later dismissed, the timely filing
2 of the complaint does not 'toll' or suspend the [] limitations
3 period." O'Donnell v. Vencor Inc., 466 F.3d 1104, 1111 (9th Cir.
4 2006) (per curiam); see also Wood v. Elling Corp., 20 Cal. 3d
5 353, 359 (1977) (quoting 51 Am. Jur. 2d Limitation of Actions §
6 311, at 813) ("In the absence of a statute, a party cannot
7 deduct from the period of the statute of limitations. . . the
8 time consumed by the pendency of an action in which he sought to
9 have the matter adjudicated, but which was dismissed without
10 prejudice to him.'). "[I]f the suit is dismissed without
11 prejudice, meaning that it can be refiled, then the tolling
12 effect of the filing of the suit is wiped out and the statute of
13 limitations is deemed to have continued running from whenever the
14 cause of action accrued, without interruption by that filing."
15 Elmore, 227 F.3d at 1011.

16 Nor is there a way for this action to "relate back" to the
17 prior action. See O'Donnell, 466 F.3d at 1111 (second complaint
18 does not "relate back" to first complaint because it is not an
19 "amendment" but a separate filing); Young v. Rorem, 977 F.2d 594
20 (9th Cir. 1992) (unpublished) (new action cannot "relate back" to
21 original complaint under Federal Rule of Civil Procedure 15(c)
22 because the original action was dismissed and not pending when
23 the new action was filed); Hill v. Prunty, 55 F. App'x 418, 419
24 (9th Cir. 2003) (new complaint alleging same claim does not
25 relate back to prior complaint, even if the prior complaint was
26 dismissed without prejudice).

D

Plaintiff argues that he is also entitled to equitable tolling while the prior federal action was pending.

This Court must apply California law governing equitable tolling. Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004). In California, when a plaintiff pursues identical claims in two different actions, equitable tolling applies during the pendency of the prior action only if it was filed in a different forum; successive identical claims pursued in the same forum are not entitled to equitable tolling. See Martell v. Antelope Valley Hosp. Med. Ctr., 67 Cal. App. 4th 978, 985 (1998) ("[u]nder equitable tolling, the statute of limitations in one forum is tolled as a claim is being pursued in another forum"). "The doctrine of equitable tolling . . . only applies where the plaintiff has alternate remedies and has acted in good faith." Thomas v. Gilliland, 95 Cal. App. 4th 427, 434 (Cal. Ct. App. 2002). "Under California law, equitable tolling 'reliev[es] plaintiff from the bar of a limitations statute when, possessing several legal remedies he, reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damage.'" Cervantes v. City of San Diego, 5 F.3d 1273, 1275 (9th Cir. 1993) (alteration in original) (quoting Addison v. California, 21 Cal. 3d 313, 317 (1978)).

In contrast, when a plaintiff pursues the same claim in the same forum, as in the instant case, the statute of limitations may be tolled under California law only under a "general equitable rule" known as the "Bollinger rule." See Bollinger v. Nat'l Fire Ins. Co., 25 Cal. 2d 399, 410 (1944)). In Bollinger,

1 “(1) the trial court had erroneously granted the initial nonsuit,
2 (2) dilatory tactics on the part of the defendant had prevented
3 disposition of the first action in time to permit a [timely]
4 second filing . . ., and (3) plaintiff had at all times proceeded
5 in a diligent manner.” Wood, 20 Cal. 3d at 360 (citing
6 Bollinger, 25 Cal. 2d at 406). “[T]he concurrence of the three
7 factors present in Bollinger is essential to an application of
8 the rule stated therein.” Wood, 20 Cal. 3d at 360; see also
9 Allen v. Greyhound Lines, Inc., 656 F.2d 418, 421 (9th Cir. 1981)
10 (“the California Supreme Court in Wood . . . limited Bollinger to
11 its facts . . . [requiring that] plaintiff must demonstrate the
12 existence of those three factors present in Bollinger”).

13 Essential to the application of the Bollinger rule is “the
14 fact that the plaintiff is [otherwise] left without a judicial
15 forum for resolution of the claim . . . attributable to forces
16 outside the control of the plaintiff.” Hull v. Cent. Pathology
17 Serv. Med. Clinic, 28 Cal. App. 4th 1328, 1336 (Cal. Ct. App.
18 1994) (citing Wood, 20 Cal. 3d at 361-62). Tolling under the
19 “Bollinger rule” is thus intended to “‘serve the ends of justice
20 where technical forfeitures would unjustifiably prevent a trial
21 on the merits.’” Addison, 21 Cal. 3d at 318-19 (quoting
22 Bollinger, 25 Cal. 2d at 410).

23 Because Plaintiff proceeds with the same claims in the same
24 forum, Bollinger applies and the Court will look to the three
25 factors in Bollinger. California law makes clear that in order
26 to be entitled to equitable tolling under Bollinger, a plaintiff
27 must demonstrate all three Bollinger factors. See Allen, 656
28 F.2d at 421 (“The [California Supreme Court] thus made it clear

1 that to avoid the literal language of [section 355], the
2 plaintiff must demonstrate the existence of those three factors
3 present in Bollinger.”); Hull, 28 Cal. App. 4th at 1337
4 (reiterating that the three Bollinger factors are prerequisites
5 expressly required to apply tolling); Wood, 20 Cal. 3d at 360
6 (“the concurrence of the three factors present in Bollinger is
7 essential to an application of the rule”); Dimcheff v. Bay Valley
8 Pizza Inc., 84 F. App’x 981, 982-83 (9th Cir. 2004).

9 With respect to the third Bollinger factor, the Court finds
10 that Plaintiff proceeded in a diligent manner. However, the
11 first two Bollinger factors, trial court error in granting
12 summary judgment and dilatory defense tactics, are not found in
13 this case. This Court did not erroneously grant the motion for
14 summary judgment for failure to exhaust in Gibbs 1. As described
15 in Gibbs 1, the law is well settled that a prisoner must exhaust
16 administrative remedies prior to filing a federal civil rights
17 complaint. Nor were there any dilatory tactics on the part of
18 Defendants that delayed disposition of the first action.
19 Defendants timely filed a motion to dismiss for failure to
20 exhaust that was denied without prejudice to refile as a
21 summary judgment motion in light of Albino v. Baca, 747 F.3d 1162
22 (9th Cir. 2014). While this change of law was beyond Plaintiff’s
23 contro, Plaintiff sought to file a second amended complaint,
24 while the motion to dismiss was pending, which delayed
25 proceedings because the second amended complaint included a new
26 claim against a Defendant who needed to be served. In his
27 opposition to summary judgment in Gibbs 1, Plaintiff argued that
28 by amending the complaint with a new claim, all claims were

1 exhausted. Opposition, Gibbs 1, Docket No. 145. Plaintiff's
2 argument was not correct and it shows that Plaintiff was aware of
3 the exhaustion issue when Defendants filed the original motion to
4 dismiss in Gibbs 1. Yet, he continued to litigate the case for
5 several more years.

6 Thus, the Bollinger rule is not applicable to this case
7 because Plaintiff can only demonstrate the existence of one of
8 the three factors. Therefore, Plaintiff is not entitled to
9 equitable tolling. See Dimcheff, 84 F. App'x at 983 (tolling not
10 available when second Bollinger factor not met); Flowers v.
11 Alameda Cnty. Sheriff's Deputy Bixby, No. 12-cv-3181-YGR, 2015 WL
12 1393582, at *4-8 (N.D. Cal. Mar. 26, 2015) (pro se prisoner not
13 entitled to tolling under Bollinger); Sandoval v. Barneburg, No.
14 12-cv-3007-LHK, 2013 WL 5961087, at *3 (N.D. Cal. Nov. 7, 2013)
15 (finding pro se prisoner not entitled to equitable tolling during
16 pendency of his prior federal lawsuit); Mitchell v. Snowden, No.
17 2:15-cv-1167 TLN AC P, 2016 WL 5407858, at *3-7 (E.D. Cal. June
18 10, 2016)(Bollinger not applicable to pro se prisoner where none
19 of the factors were met); Dawkins v. Woodford, No. 09-cv-1053 JLS
20 (POR), 2012 WL 554371, at *4-5 (S.D. Cal. Feb. 21, 2012)
21 (concluding pro se prisoner was not entitled to equitable tolling
22 during pendency of his prior federal actions, which were
23 dismissed for failing to timely serve defendants).

24 While this is a troubling ruling against a pro se litigant,
25 the Court is bound by federal and state laws. The Court notes
26 that Plaintiff was informed in October 2013 in Defendants' motion
27 to dismiss in Gibbs 1 that his claims were not properly
28 exhausted. Defendants noted that because Plaintiff exhausted his

1 claims after filing suit in Gibbs 1 that the action should be
2 dismissed without prejudice. In October 2013 the statute of
3 limitations had only been running for seven to nine months, and
4 with tolling, Plaintiff still had 17-19 months to timely file a
5 new case. While the Court cannot fault Plaintiff for continuing
6 to litigate Gibbs 1, his filing of a second amended complaint
7 with a new claim, in an attempt to make the unexhausted claims
8 exhausted, further delayed the Court's adjudication of Gibbs 1.
9 For all these reasons, Plaintiff is not entitled to equitable
10 tolling.⁴

11 E

12 Equitable estoppel is another doctrine which may apply to
13 extend the limitations period on equitable grounds. Lukovsky,
14 535 F.3d at 1051. Equitable estoppel "focuses primarily on
15 actions taken by the defendant to prevent a plaintiff from filing
16 suit, sometimes referred to as 'fraudulent concealment.'" Lukovsky
17 at 1051 (citing Johnson, 314 F.3d at 414).

18 Under California law, equitable estoppel requires that:

19 (1) the party to be estopped must be apprised
20 of the facts; (2) that party must intend that
21 his or her conduct be acted on, or must so
22 act that the party asserting the estoppel had
23 a right to believe it was so intended; (3)
24 the party asserting the estoppel must be
25 ignorant of the true state of facts; and (4)
26 the party asserting the estoppel must
27 reasonably rely on the conduct to his or her
28 injury.

26 ⁴ The Court notes that it is not clear if the federal equitable
27 tolling rule mentioned in Lukovsky v. San Francisco, 535 F.3d
28 1044, 1051 (9th Cir. 2008) and Johnson v. Henderson, 314 F.3d
409, 414 (9th Cir. 2002), applies in § 1983 actions because
Lukovsky did not decide the question, see Lukovsky, 535 F.3d at
1051 & n.5, and Johnson was not a § 1983 action.

1 Lukovsky, 535 F.3d at 1051-52 (quoting Honig v. S.F. Planning
2 Dep't, 127 Cal. App. 4th 520, 529 (2005)). In order to establish
3 equitable estoppel, or "fraudulent concealment" by defendants,
4 the plaintiff must show "some active conduct by the defendant
5 above and beyond the wrongdoing upon which the plaintiff's claim
6 is filed." Id. (internal quotation marks omitted).

7 Plaintiff seeks equitable estoppel due to his placement in
8 Ad. Seg., prison transfers, harassment, denial of law library
9 access and deprivation of legal property. Opposition at 9-16.

10 Yet, during this time period, Plaintiff was actively
11 litigating Gibbs 1, Case No. 13-cv-0860-TEH. During this same
12 period he was also actively litigating the following cases in
13 this Court: Gibbs v. Carson, No. 13-cv-2114 TEH; Gibbs v.
14 Chisman, No. 13-cv-2488 TEH; Gibbs v. Bradford, No. 14-cv-0641
15 TEH, (transferred to the Eastern District and opened as No. 14-
16 cv-0831 TLN-AC.; Gibbs v. Petersen, No. 14-cv-4200 TEH; Gibbs v.
17 Dennehy, No. 14-cv-5301 TEH.⁵ Based on Plaintiff's ability to
18 actively litigate all of these cases, which included dozens of
19 extensive filings, the Court does not find that Defendants
20 prevented Plaintiff from filing suit.⁶

21
22 ⁵ The Court grants Defendants' request for judicial notice. Docket
23 No. 32. A district court "may take notice of proceedings in
24 other courts, both within and without the federal judicial
system, if those proceedings have a direct relation to matters at
issue." Bias, 508 F.3d at 1225.

25 ⁶ Plaintiff's claims against Defendants in their official
26 capacities are dismissed. A suit against a state official in his
27 official capacity is not a suit against the official but rather a
28 suit against the official's office, i.e., the state. See Will v.
Mich. Dep't of State Police, 491 U.S. 58, 71 (1989). Therefore,
neither a state nor its officials acting in their official
capacities may be sued under § 1983. Id. The case proceeds
against Defendants in their individual capacities.

II

For the foregoing reasons, the Court hereby orders as follows:

1. Defendants' motion to dismiss (Docket No. 23) is GRANTED. The January 3, 2013 claim against Defendant Wood is dismissed with prejudice as untimely, and the March 15, 2013 claim against Evans is dismissed with prejudice as untimely. Defendant Evans is dismissed from this action.

2. The case continues with the claim against Defendants Wood, Royal and Milton with respect to placing and keeping Plaintiff on C-status in retaliation for his protected conduct. Those Defendants shall follow the instructions set forth below. In addition, Plaintiff has provided new information to serve Defendant Milton. Plaintiff notes that he provided the wrong name and that the Defendant is actually "D. Melton."

3. The Clerk of the Court shall issue summons and the United States Marshal shall serve, without prepayment of fees, a copy of the second amended complaint (Docket No. 11), and a copy of this order upon Defendant D. Melton at Pelican Bay State Prison.

4. In order to expedite the resolution of this case, the Court orders as follows:

a. No later than 91 days from the DATE OF SERVICE OF THIS ORDER, Defendants shall file a motion for summary judgment or other dispositive motion.⁷ The motion shall be supported by

⁷ If there are delays serving Defendant Melton or if Melton is not represented by the Attorney General's Office, the Court will issue a further order.

adequate factual documentation and shall conform in all respects to Federal Rule of Civil Procedure 56, and shall include as exhibits all records and incident reports stemming from the events at issue. If Defendant is of the opinion that this case cannot be resolved by summary judgment, he shall so inform the Court prior to the date his summary judgment motion is due. All papers filed with the Court shall be promptly served on the plaintiff.

b. At the time the dispositive motion is served, Defendants shall also serve, on a separate paper, the appropriate notice or notices required by Rand v. Rowland, 154 F.3d 952, 953-54 (9th Cir. 1998) (en banc), and Wyatt v. Terhune, 315 F.3d 1108, 1120 n.4 (9th Cir. 2003). See Woods v. Carey, 684 F.3d 934, 940-41 (9th Cir. 2012) (Rand and Wyatt notices must be given at the time motion for summary judgment or motion to dismiss for nonexhaustion is filed, not earlier); Rand at 960 (separate paper requirement).

c. Plaintiff's opposition to the dispositive motion, if any, shall be filed with the Court and served upon Defendants no later than thirty days from the date the motion was served upon him. Plaintiff must read the attached page headed "NOTICE - WARNING," which shall be provided to him pursuant to Rand v. Rowland, 154 F.3d 952, 953-954 (9th Cir. 1998) (en banc), and Klinge v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988).

If Defendants file a motion for summary judgment claiming that Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), plaintiff should take note of the attached page headed "NOTICE -- WARNING

(EXHAUSTION)," which shall be provided to him as required by
Wyatt v. Terhune, 315 F.3d 1108, 1120 n.4 (9th Cir. 2003).

d. If Defendants wish to file a reply brief, they
shall do so no later than fifteen days after the opposition is
served upon them.

e. The motion shall be deemed submitted as of the date
the reply brief is due. No hearing will be held on the motion
unless the court so orders at a later date.

5. All communications by Plaintiff with the Court must be
served on Defendant, or Defendants' counsel, by mailing a true
copy of the document to Defendants or Defendants' counsel.

6. Discovery may be taken in accordance with the Federal
Rules of Civil Procedure. No further court order under Federal
Rule of Civil Procedure 30(a)(2) is required before the parties
may conduct discovery.

7. It is Plaintiff's responsibility to prosecute this case.
Plaintiff must keep the court informed of any change of address
by filing a separate paper with the clerk headed "Notice of
Change of Address." He also must comply with the court's orders
in a timely fashion. Failure to do so may result in the
dismissal of this action for failure to prosecute pursuant to
Federal Rule of Civil Procedure 41(b).

IT IS SO ORDERED.

Dated: 4/20/2017



THELTON E. HENDERSON
United States District Judge